

# **FUNDAMENTALS OF TRIAL ADVOCACY COURSE**

September 30 – October 4, 2019

Phoenix, Arizona



## **CROSS EXAMINATION**

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# The Art of Cross Examination

A.K.A. "HOW TO BE A COURTROOM NINJA"



# Cross Examination:

- ▶ The key to a good cross-examination is having a good strategy

Sun Tzu: Ancient  
Chinese Badass



When we make  
our position  
unassailable,  
cross-  
examination is  
just fun

**The art of war teaches us to  
rely not on the likelihood of  
the enemy's not coming, but  
on our own readiness to  
receive him; not on the chance  
of his not attacking, but rather  
on the fact that we have made  
our position unassailable.**



QUOTEHD.COM

**Sun Tzu**  
Chinese Military Strategist  
1753 - 1818

# Cross Examination: Objectives

- ▣ Use Defense witnesses and evidence to advance your theme and theory
- ▣ Show defense witnesses to be untruthful and/or biased
- ▣ Eliminate confusion for closing



# Cross Examination does NOT mean



- ▣ Using an aggressive tone
- ▣ Yelling, berating, or being sarcastic with the witness
- ▣ Arguing with the witness about unimportant details

# Phase 1: Preparation

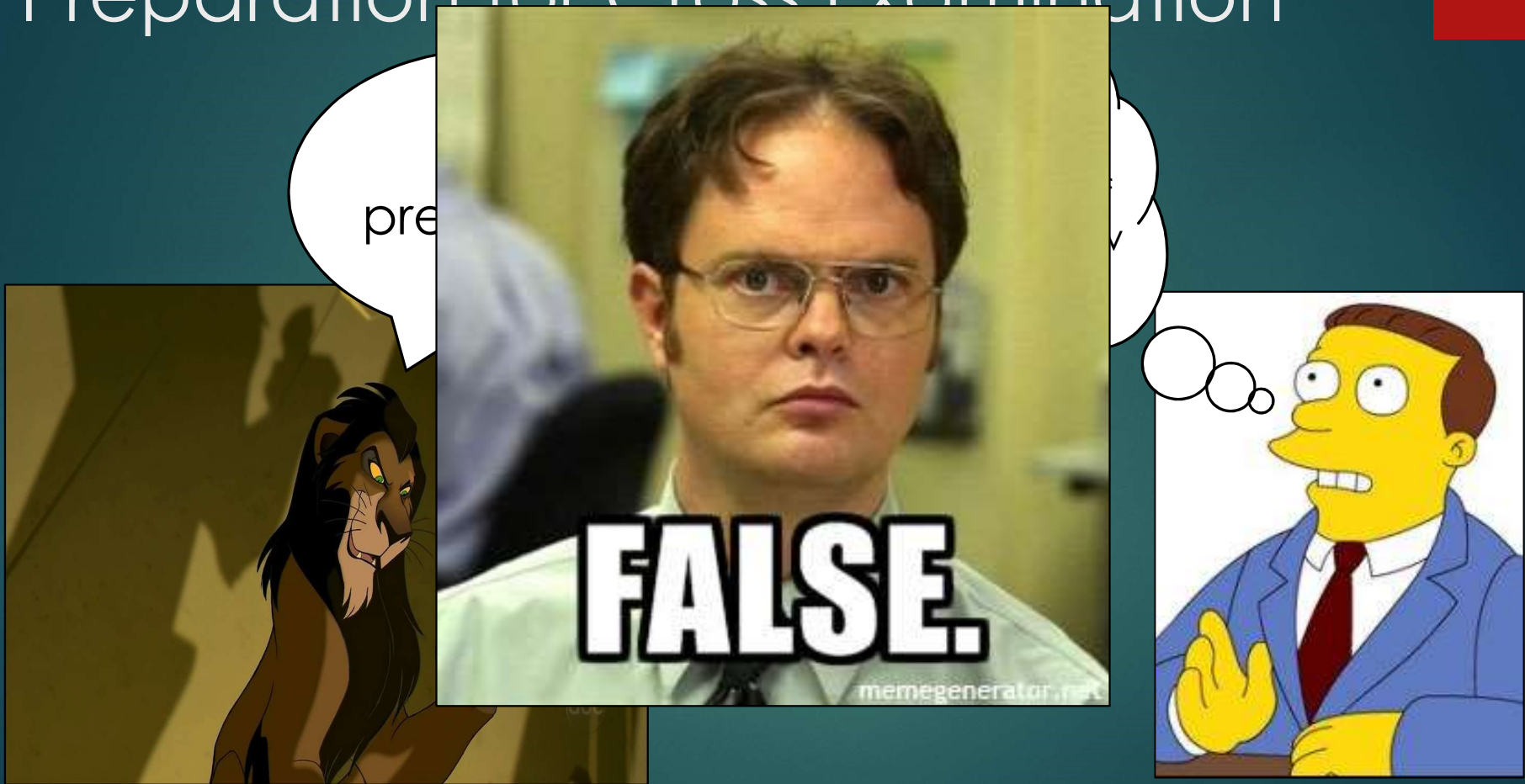


“Every battle is won  
before it is fought”

- Sun Tzu, The Art of War




# Preparation for Cross Examination



# Preparation for Cross Examination

1. Know Yourself: Theme, Theory, Proof of Elements
  - ▣ Identify elements or points of your case which the Defense MUST concede
2. Know Your Enemy:
  - ▣ Who are the Defense witnesses?
  - ▣ What Defenses are they testifying to?
  - ▣ How are they going to try to beat me?

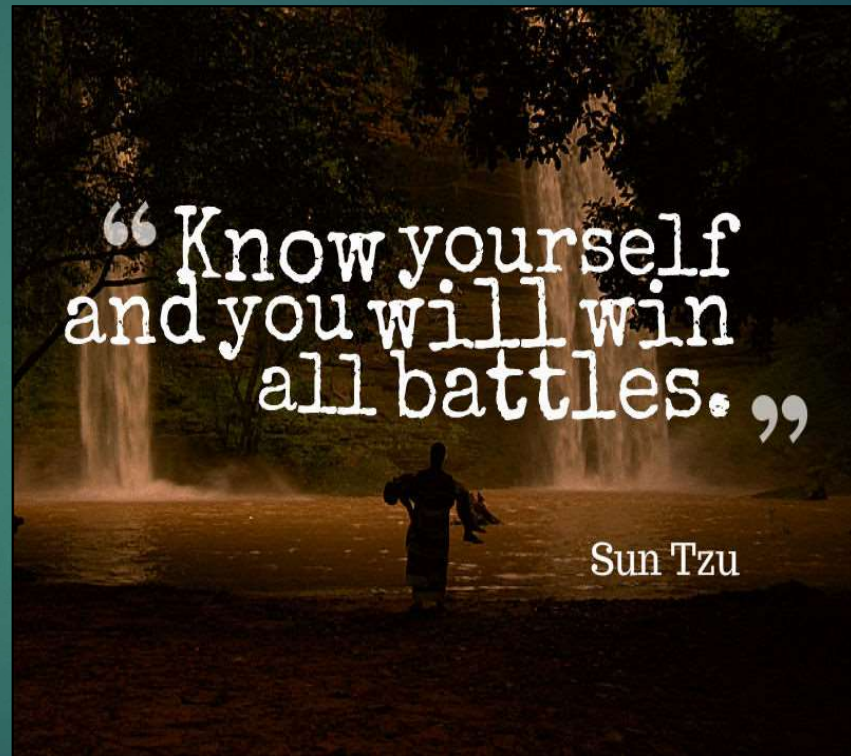


“If you know the  
enemy and know  
yourself, you need not  
fear the result of a  
hundred battles”

- Sun Tzu, The Art of War

# Know Yourself – Case Preparation

- ☐ Force yourself to write out each piece of evidence you have to support each element of your offenses
- ☐ This will immediately help you identify where you are vulnerable, including things you haven't realized yet



## Robinson Case Overview

Defense Attorney: Genii Rogers  
[genii.rogers@pinalcountyz.gov](mailto:genii.rogers@pinalcountyz.gov)

Date(s): February 11, 2015  
Location: San Tan Valley (Gantzel and Bella Vista)  
Jurisdiction: Pinal County  
ID: Deputy Leonard

### Count 1: MIW, C4F

- ☐ Defendant
  - ID from Leonard
  - Documents in car
- ☐ Knowingly possessed
  - Steering column compartment
  - Defendant's car
    - Defendant driving
    - Defendant's possessions within car
      - Name on items
      - Lack of items belonging to anyone else
    - Other contacts with Defendant
  - Defendant's statements to Leonard
    - First claims no gun
    - Once gun found, claims it's his girlfriends
    - No questions about where gun found, what kind of gun etc.
- ☐ Deadly weapon
  - Gun into evidence
  - Make/model
- ☐ While being a prohibited possessor
  - D's priors - admit & link through Rex

Elements of my charge from Jury Instructions

Ask yourself: Where am I weak?

Evidence I have to prove each element



# Know Yourself: Strengths

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#### ☐ Deadly weapon

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#### ☐ While being a prohibited possessor

- D's priors - admit & link through Rex

- ▶ Which elements/evidence/arguments must the Defense concede?
  - ▶ Is ID an issue?
  - ▶ Are there things a defense witness can give you that they won't realize hurt them?
- ▶ State v. Daniel Jackson
  - ▶ What must the Defense concede?



# Know Your Enemy



To know your Enemy, you  
must become your Enemy.

Sun Tzu

quotefancy

# Know Your Enemy

Anticipating Defenses:

- ▣ 15.2
- ▣ Deviation Requests
- ▣ Settlement Conferences
- ▣ **Interview Defense Witnesses**



## Streed Impeachment

### Circumstances of Retirement

"ultimately I was subjected to a punitive transfer sending me back to patrol" [notice of claim, pg. 1]

"as a result of these actions I was forced into an early retirement by the San Diego County Sheriff's Department" [notice of claim, pg. 1]

"On February 5, 1991, I was informed by Sheriff's Captain Stan Embry that I was being transferred 9after seventeen years in the homicide detail) to a patrol car" [notice of claim, pg.8]

"I was transferred to the Sheriff's Descano Detention facility on February 22,1991, and, as a result of the continued harassment, I retired march 21, 1991" [notice of claim, pg.9]

"These statements, and similar ones by members of the San Diego County Sheriff's Office and San Diego Police Department, which referred to me as a 'renegade,' 'out of control,' 'loose cannon,' and 'maverick' caused me personal embarrassment, emotional distress, and has a negative impact on my professional reputation." [notice of claim, pg.9]

Q: What was it that made you decide to transition to a new career?

A: ..... [Chavez interview transcript pg. 31]

### Task Force

"While I was on my annual vacation in January, 1989, a group of S.D.P.D. administrators met with Sheriff John Duffy, falsely alleging that I was a 'loner,' that my methods of investigation were not complimentary to the 'needs' of the Task Force; and that I was 'difficult' to work with." [notice of claim

F up" (13:40)

8)

gun in his hand, and back  
n't know who shot the gun

" (17:29)

## Phase 2: Classify the Witness

“The opportunity to secure ourselves against defeat lies in our own hands, but the opportunity of defeating the enemy is provided by the enemy himself.”

- Sun Tzu, The Art of War

# Characterize the Witness

- ▣ Who is the witness? What is their relationship to the Defendant?
- ▣ What are they going to say?
- ▣ If believed, does the witness' testimony hurt me?
- ▣ Is there anything else I can get from the witness that is useful to my case?





# Characterize the Witness

## ▣ **High Credibility / Low Impact (truthful, mistaken, or ignorant witness)**

- ▣ Always have low impact (if properly understood)
- ▣ Can make them your witness

## ▣ **Low Credibility / High Impact (lying witness)**

- ▣ Always have bias of some kind
- ▣ By virtue of relationship with D, what else must they know
- ▣ Witness showed up to lie about one thing. Make them go beyond
- ▣ Will always have reasons to lie



# Different Kinds of Witnesses

▣ High Credibility



▣ Low Credibility



State v. Jackson:  
Characterize Your  
Witnesses

# Cross of Defendant



- ▣ Always low credibility / high impact
- ▣ Start with concessions (eliminate elements)
- ▣ Lock into a story
- ▣ Attack on contested element

# Phase 3: Organization

“Thus, what is of supreme importance in war is to attack the enemy's strategy”

- Sun Tzu, The Art of War

# Create an outline of your cross

- ▣ Always start with Concessions
- ▣ Attack points grouped by subject matter
  - ▣ Relationship with Victim
  - ▣ Cooperation with Police
- ▣ Signposting
  - ▣ Each area starts with a signpost
  - ▣ Signpost signals to the jury the point you are trying to make with the line of questioning

# Signposting

- This is the point you are trying to make
- Signal the jury as to what you are about to address with the witness
- Signal the witness to what you want them to talk about
- Examples:
  - I'd like to talk about your claim that you didn't know the car was stolen
  - I'd like to ask you some questions about your statements to the police
  - Let's talk about the amount of time you spent preparing for this case





My signpost is signaling to the jury that his story doesn't make sense. Then, I will break down why it doesn't.

11 Q Mr. Martinez, I want to talk to you about  
12 your story a little bit. And particularly I want to  
13 talk to you about why it doesn't make any sense. So  
14 according to you, the plan, when all of you get in the  
15 car, is that you're going to Flagstaff, correct?

16 A Yes.

17 Q I want to show you State's Exhibit 15.  
18 Do you recognize that?

19 A That's her wallet. That's her purse.

20 Q Ashley's wallet and her purse, right?

21 A Uh-huh.

22 Q And where are they still sitting?

23 A They're still at her house.

24 Q I want to show you State's Exhibit 17.

25 What's that?

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1 A That's a foot.

2 Q Whose foot?

3 A Whose do you think?

4 Q Whose foot is it, Mr. Martinez?

5 A Are we talking about Ashley right now?

6 Are we talking about Ashley, so it's her foot. She's




# Step 1: Concessions

You can agree with  
me or you can be  
wrong.



your  cards  
someecards.com

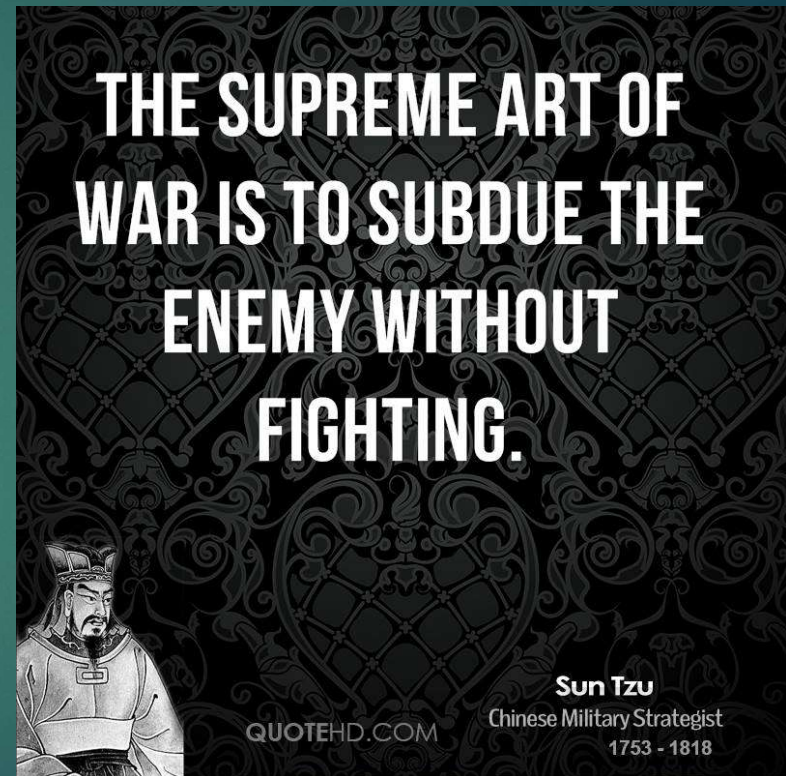


“You can be sure of  
succeeding in your  
attacks if you only  
attack the places that  
are undefended”

- Sun Tzu, The Art of War

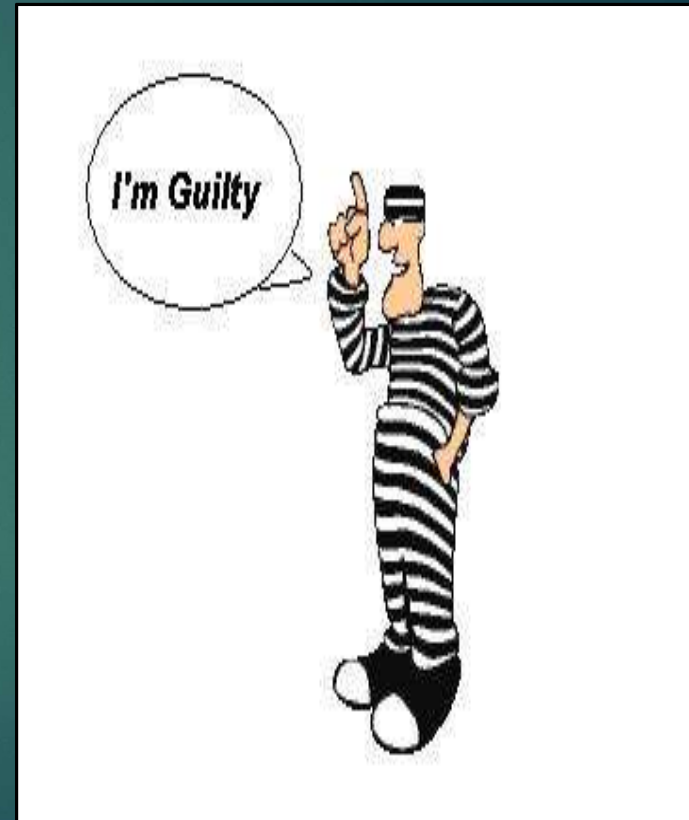
# Concessions: The Undefended

- Nearly every cross examination should begin with concessions. Concessions are points the witness **MUST** agree with you on (or lose credibility if they don't)
  - Works regardless of witness classification
  - Witness is expecting a fight and may be caught off-guard
  - You will be far less likely to get them after you attack
- **If you get nothing else on cross examination of a Defense witness, get concessions**



# Concessions

- ▣ Elements of your case – what must Defendant concede?
  - ▣ Narrow focus and clarify issue for the jury
  - ▣ Eliminate confusion
  - ▣ Show where the real fight is
- ▣ What other important aspects must Defendant agree to



By getting  
him to agree  
that the  
victim would  
be hurt by  
the action,  
what do I  
accomplish?

21 Q Now I'm going to show you State's Exhibit

22 2. And so you just said that's a long drop there, the  
23 outside, correct?

24 A Uh-huh. Yeah.

25 Q And you would agree that if someone fell

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1 from that distance, that would hurt?

2 A If Ashley fell, she'd probably get hurt,  
3 yeah.

4 Q She might get hurt?

5 A If she didn't land on her feet, she's  
6 going to get hurt.



# Concessions: The Undefended

- ▣ Do not limit yourself to the topic the witness came to testify about
- ▣ Arizona Rule of Evidence 611(b): "A witness may be cross-examined on any relevant matter"
- ▣ Ask yourself: given the nature of this witness' relationship with the Defendant, what things are they in a position to help me with?

State v. Jackson: What info might you get from the Defendant's wife (victim)?





## Step 2: Direct Attack on Contested Areas

Let your plans be dark  
and impenetrable as night,  
and when you move,  
fall like a thunderbolt

Sun Tzu

- ▣ Once you have gained concessions, it is time to attack the Defense's case directly
- ▣ Signpost the beginning of each area of attack
- ▣ Follow up signpost with evidence that supports your position

# Cross: Direct Attack

- ▣ Start with a signpost that signals the point you are making
- ▣ Small Bites: one piece of info per question
- ▣ Listen to the answer and follow where the witness leads
- ▣ Don't repeat Defendant's theory
- ▣ Ask questions based on what he must agree to and what you can prove. He's not going to confess!
- ▣ Each question should advance the ball – don't ask pointless questions

# Direct Attack: Ideas for Cross

- Defendant had a reason to commit the crime
  - *You would agree with me that you are not able to legally purchase a gun*
- Defendant had the ability to commit the crime
  - *You agree that you were familiar with this store? Familiar with these roads? You drive a blue audi?*
- Defendant knows the evidence against him and prepared for trial
  - *You have copies of the police reports? You know what the witnesses said against you?*
- Timeline
- Defendant can't explain certain things? / Coincidence? / Does that make sense to you?
- Story has changed
- Story doesn't make sense

# Phase 4: Execution

“He who can modify his tactics in relation to his opponents, and thereby succeed in winning, may be called a heaven-born captain”

- Sun Tzu, The Art of War

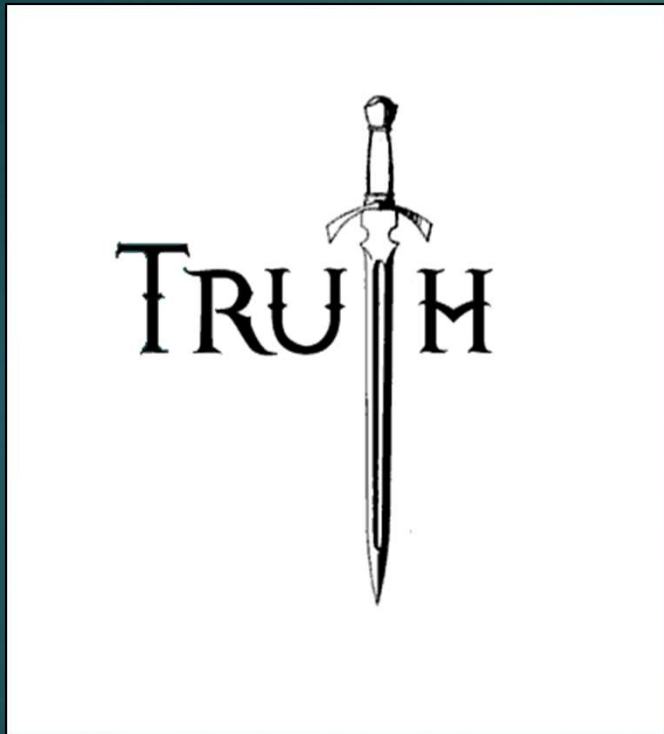
# Questioning the Witness



- ▣ Keep Characterization of the witness in mind: before beginning cross, always ask yourself "Did they hurt me?"
- ▣ Start with Concessions
- ▣ Move forward with Direct Attack
- ▣ Finish strong
- ▣ Avoid "one question too many"



# Weapons of War



- ▣ Sword of Truth
- ▣ Impeachment Ammunition
- ▣ Knives (Leading Questions)
- ▣ Hanging Rope (Open-ended Questions)
- ▣ Smoke Signals (Signposting)

***You must master them all!***

# Types of Questioning

## ▣ Leading Questions

▣ *You told the officer you had 2 drinks?*

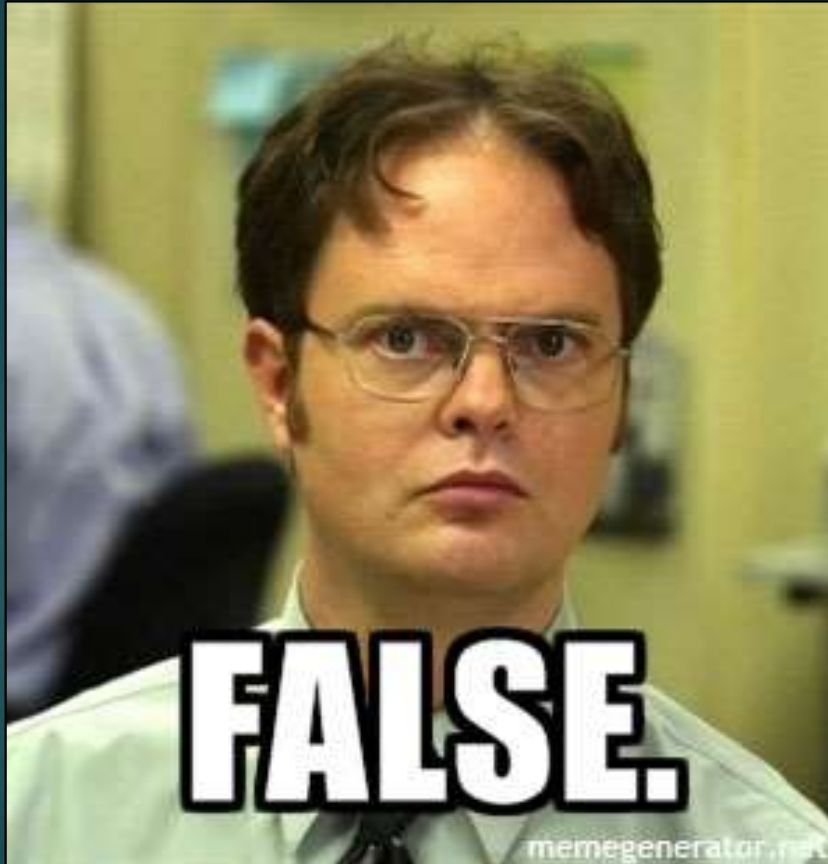
## ▣ Directed Questions

▣ *Did you tell the officer you had 2 drinks?*

## ▣ Open-Ended Questions

▣ *How many drinks did you tell the officer you had?*

# Did she say open-ended questions???



But, I cant ask a question I don't know the answer to!!



# Rules for Questions on Cross

## Leading Questions

- ▣ Who is Testifying?
- ▣ YOUR credibility is at issue
- ▣ Watch use of “correct,” “right,” “Isn’t it true”

## Open-Ended Questions

- ▣ Only when the answer CAN’T hurt you!
- ▣ LYING WITNESS
- ▣ Useful to lock into a story
- ▣ Allowing a witness to lie in narrative fashion before a jury can provide you with a lot to work with, but you must listen and be prepared to go where the witness takes you

Don't Do This:





# Witness Control



- ▣ Repeat the Question
- ▣ Juxtaposition Technique
- ▣ Object as non-responsive
  - ▣ Never answer a witness' question
  - ▣ Tone should be firm, but NEVER lose your cool

# Cross Examination Examples:













# The Art of Cross Examination

Questions???